U.S.

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No. 94-1058

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1994

WILLIAM DOUGLAS CARTER,

Petitioner,

V.

WILLIAM T. BURCH,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a prosecutor is entitled to absolute immunity for challenged conduct that occurred during his role as the state's advocate?

2. Whether the bar of prosecutorial immunity can be circumvented by conclusory allegations that the prosecutor engaged in a conspiracy?

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SUMMARY OF THE ARGUMENT

Respondent Burch, who prosecuted Carter in his first criminal trial, was correctly dismissed as a defendant before trial because of absolute prosecutorial immunity. The public policy rationale for the doctrine stated in Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984 (1976) and Buckley v. Fitzsimmons, 113 S.Ct. 2606 (1993), applies because all of prosecutor Burch's challenged actions occurred while he was acting as the state's advocate. Further, if a disgruntled former criminal defendant were able to circumvent the bar of absolute prosecutorial immunity simply by the device of a conclusory allegation of conspiracy, the holdings of Imbler and Buckley would be effectively eviscerated.

Contrary to petitioner's assertions, there is no conflict between the circuits

that requires resolution.

STATEMENT OF THE CASE

The facts of Petitioner Carter's civil rights claim are inextricably bound together with the proceedings in the underlying criminal trials.

I. Carter's First Criminal Trial

Carter was tried and convicted on March 11, 1988 of maliciously wounding his former wife, Carole Vandergrift. She testified that Carter awakened her in the middle of the night, that a struggle ensued, and Carter shot her in the head behind her right ear. The bullet miraculously exited from Ms. Vandergrift's neck without inflicting grave injury.

A. Carter's Attempted Murder Of His Former Wife

The prosecution also presented

evidence that following a very bitter and acrimonious divorce, Carter planned his wife's shooting in advance and attempted to make it look like a suicide.

In the divorce, a finding was entered in favor of Ms. Vandergrift. The property settlement was so favorable to her that Carter was forced to sell his beloved mansion in Middleburg, Virginia. Before the sale was finalized, however, Carter repeatedly threatened his wife and, according to the prosecutor, his anger and revenge reached such a height that he entered the mansion at 2:30 a.m. on the 31st day of July, 1987, in violation of a Loudoun Circuit Court restraining order, and tried to murder his wife.

B. <u>Carter's Alibi Defense Failed Because Of His Wife's Scratches On His Face</u>

Carter's defense alternated between

an alibi and self inflicted wound theory. He claimed that he had left the evening prior to the shooting to go to Saratoga, New York. His attorneys also attempted to argue that Ms. Vandergrift was unstable and may have tried to shoot herself. Fatal to Carter's defense was the evidence, produced by the prosecution, that Ms. Vandergrift scratched Carter's face, shoulder, and arm vigorously during their struggle and the finding by the Saratoga, New York Sheriff's Deputies of fresh, still oozing wounds on Carter's face the next morning. Carter's explanation that he had been scratched by a tree limb sometime before the shooting was destroyed by a woman acquaintance who stated unequivocally that when she left Carter (some four hours prior to the shooting) he had no scratches on his face.

II. All Of The Challenged Actions Of Prosecutor Burch Occurred In His Role As Advocate For The State

In his initial complaint,[1] Carter alleged that prosecutor Burch instructed a witness, Suzanne Culver, to perjure herself at Carter's first trial. (JA 17.) Carter also alleged that Burch presented Culver's perjured testimony at trial, which helped to secure Carter's conviction. (JA 12.) Further, Carter alleged that after Carter's convictions, Burch learned of the "Poppa evidence," yet withheld this materially exculpatory evidence from Carter. (JA 14.) For the purpose of reviewing the dismissal of prosecutor Burch on the ground of absolute

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[1]Burch was dismissed as a defendant before Carter filed his first amended complaint.

prosecutorial immunity, the record reflects that the relevant conversation between Poppa and Burch occurred either (1) after indictment and shortly before trial (JA 171-72.); or (2) shortly after Carter's conviction while Burch was representing the Commonwealth in post-conviction motions. (JA 54-55.)

III. The Evidence At The Trial Below

There were three important aspects of the evidence at trial which help explain the jury's verdict in favor of Carter for $1.00 in nominal damages against defendant Beamer: (1) Poppa's testimony; (2) the testimony of prosecutor Burch; and (3) the defense expert testimony of Messrs. Leffler and Horan.

A. Poppa's Testimony

Poppa testified that he told both

deputy Beamer and prosecutor Burch before the first criminal trial of the alleged "Poppa evidence." (JA 171-72.)

B. The Testimony Of Prosecutor Burch

Prosecutor Burch testified having had a conversation with Poppa about Ms. Vandergrift. However, prosecutor Burch testified that his conversation occurred after the first trial, not before, and that Poppa never told him of the "Poppa evidence." Prosecutor Burch testified that Poppa's statement to him was an inconsequential comment about Ms. Vandergrift being "suicidal" -- nothing more. (JA 267.) Poppa testified that he told prosecutor Burch the same thing he told deputy Beamer. (JA 171-72.)

C. The Expert Testimony Of Messrs. Leffler And Horan

Deputy Beamer presented two experts:

Mr. Rodney Leffler (a defense attorney) and Mr. Robert Horan (the prosecutor, who prosecuted Carter during the second criminal trial). Mr. Leffler's testimony was two-pronged. First, he testified that the so-called "Poppa evidence," if introduced at the first criminal trial, would not have changed the result, i.e., Carter would have been convicted anyway: "... the Poppa evidence made no difference whatsoever." (JA 371.) In support of his opinion, Leffler emphasized several aspects of the first criminal trial including Carter's demeanor on the witness stand, his unconvincing alibi testimony, and his "incredible" story about the way he was scratched. (JA 374.) Mr. Leffler also presented a detailed explanation of the differences between the first and the second trials to counter Carter's contention that if the "Poppa evidence"

had been given to his attorney before the first trial, he would have been acquitted. These explanations included the fact that the defense had a complete blueprint of the prosecution's case; that key pieces of evidence admitted into evidence at the first trial were excluded during the second trial; and the decision, given Carter's poor performance on the witness stand during the first trial, to keep him off the stand the second time. (JA 372-74.)

Mr. Horan supported Leffler's opinions and further opined that the "net effect" of the "Poppa evidence" was a zero, noting that Poppa "... wasn't a very good witness for the defense." (JA 408.)

1. The Fabrications Of Fry And Carter Bolstered Leffler's Opinions

A critical moment at the trial below occurred when one of Carter's witnesses,

Howard Fry, a disgruntled former jailer who had been fired for embezzling funds, was caught in a web of lies while attempting to implicate deputy Beamer. It is surprising for Carter to have featured Mr. Fry's testimony in his petition because it is clear from the record that Fry was a disaster because of his obvious fabrications.

a. Fry Lied

Howard Fry testified, for the first time some six years after the fact (he did not appear at the habeas corpus hearing), that prior to Carter's criminal trial, while Fry was working in the jail, he overheard a conversation between deputy Beamer, Lt. William Wright, and Magistrate Ed Smith about the "Poppa evidence."[2]

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[2]Fry testified that he heard Deputy Beamer repeat the "Poppa evidence" then

Fry claimed that he could remember the exact day and time that the conversation took place: September 2, 1987, sometime between 4:00 p.m. and 6:00 p.m., because that is when Carter was committed to the jail. (JA 260.) Fry's time cards, which came into evidence, showed that on the day that Carter was committed that Fry came to work at 5:45 p.m. (JA 260.) However, the time card which recorded Carter's commitment to jail, which also went into evidence, showed that Carter was committed at 9:37 a.m., some seven (7) hours before Fry came on duty (JA 277.) Additionally, Lt. Wright's time card, which was submitted to

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the group chuckled when Lt. Wright said "I hope that doesn't get out. It would blow your case." (JA 260.)

the jury, showed that Wright was not working that day. (JA 362.)

b. Carter Lied

Having seen Fry trapped in a lie, Carter tried to rescue Fry's testimony, but in doing so, lied himself. Carter, on direct examination, volunteered that although he was committed to the jail in the morning, he was taken out again in "the late afternoon" to give blood and other samples at the Loudoun County Memorial Hospital and then returned to the jail. (JA 278.) The obvious intent of this testimony was to validate Fry's testimony that the statements by deputy Beamer occurred in the late afternoon when Carter came into the jail.

c. Nurse Gruber Exposed Both Fabrications

However, the nurse from the hospital, Ms. Patricia Gruber, who took the samples

from Carter, put the lie to both Fry's and Carter's testimony. Ms. Gruber testified that all of the samples were taken at 10:30 a.m. and that it would take no longer than 45 minutes to an hour to complete the testing, thus putting Carter back into the jail well before Fry came on duty and well before deputy Beamer's alleged statements were to have occurred. (JA 356-57.)

The jury did not accept Fry's testimony or Carter's testimony, which sought to portray deputy Beamer as a malicious person, as reflected by its refusal to return punitive damages and the defendant's verdict on the claim of intentional infliction of emotional distress. Further, Carter's fabrications lent considerable support to defense experts Leffler and Horan who opined that the "Poppa evidence" was really

unimportant when compared with such factors as Carter's lack of credibility during the first criminal trial.

If ever the jury had questioned expert Leffler's opinion that Carter's testimony during the first criminal trial was "incredible," Carter's fabrications before their very eyes put those questions to rest. Unwittingly, Carter bolstered deputy Beamer's argument that the "Poppa evidence" would not in fact have caused an acquittal even if used in the first criminal trial.

ARGUMENT

I. PUBLIC POLICY REQUIRES THAT A PROSECUTOR ENJOY ABSOLUTE IMMUNITY FOR CONDUCT THAT OCCURRED DURING HIS ROLE AS THE STATE'S ADVOCATE

The principle articulated above was recognized in Imbler v. Pachtman, 424 U.S. 411 (1976). Even Petitioner recognizes

the wisdom of the rule. See Petition, p. 15. Without absolute immunity from lawsuits challenging decisions made and actions taken while acting as the state's advocate, a prosecutor would understandably be reluctant to independently and vigorously carry out his or her prosecutorial duties. Yet despite Petitioner's recognition of the correctness of Imbler, he invites the Court to revisit the balancing of competing interests resolved there and significantly dilute prosecutorial immunity. The Court should decline the invitation.

A. Petitioner Incorrectly Argues That The Ruling Of The Fourth Circuit Is Inconsistent With Those Of Other Circuit Courts Of Appeal

The case of Houston v. Partee, 978 F.2d 362 (7th Cir. 1992), does not

conflict with the Fourth Circuit opinion affirming Burch's dismissal on the grounds of absolute immunity. To the contrary, in denying the prosecutors absolute immunity, the Seventh Circuit allowed as how there is "substantial case law granting absolute immunity for acts done in various post-conviction proceedings," but noted what it called "a critical distinction" between such cases and Partee. Id. at 366. (Citations omitted.) The distinction was that the defendant prosecutors "... were not involved in the post-conviction proceedings; that is they were not personally prosecuting the appeal." Ibid. (Footnote omitted). Accordingly, absolute immunity was denied the prosecutors in Partee because they were not in advocacy roles at the time they took the actions complained of. This is a clear distinction from the case at bar.

The Fourth Circuit noted that if the "Poppa evidence" were given to Burch after Carter's arrest but before his conviction, this was during Burch's preparation for a presentation of the case. App. 12. And if the "Poppa evidence" were given to Burch later,

> . . . the evidence is uncontradicted that, at the time Burch testified that he learned of the "Poppa evidence" and failed to disclose it, he was handling the post-conviction motions and the initial direct appeal to the Court of Appeals of Virginia, after which the Attorney General's office took over. In these post-trial motions and preparations for appeal, Burch was still functioning as an advocate for the State, and not in an investigatory capacity.

Id.

Nor does the Fourth Circuit's opinion conflict with Hilliard v. Williams, 516 F.2d 1344 (6th Cir. 1975), which is an old case that is no longer viable. See 424

U.S. 961, 96 S.Ct. 1453 (1976), 540 F.2d 220 (6th Cir. 1976). The rulings in Hilliard were overturned by this Court vis-a-vis prosecutorial immunity in Imbler v. Pachtman and, as regards a police officer testifying falsely in court, in Briscoe v. LaHue, 460 U.S. 325, 103 S.Ct. 1108 (1983).

And neither Malachowski v. City of Keene, 787 F.2d 704 (1st Cir.) nor San Filippo v. U.S. Trust Co. of New York, Inc., 737 F.2d 246 (2d Cir. 1984), addressed the issue of whether the absolute immunity of a prosecutor for acts taken in pursuit of his or her prosecutorial function may be breached by the device of pleading a conspiracy. These cases only held that a witness' absolute immunity does not extend to a claim that the witness conspired with the prosecutor to provide perjured testimony.

If a plaintiff were able to circumvent the bar of prosecutorial immunity simply by conclusory allegations of conspiracy, the ruling of Imbler and the functioning of the criminal justice system would be considerably weakened. See, also, Briscoe v. LaHue, supra, where this Court extended the absolute immunity of prosecutors to witnesses in criminal trials. In reaching this conclusion the Court considered the situation where a plaintiff would allege a conspiracy between a witness and prosecutor to present perjured testimony and, even under those circumstances "... whether private witnesses may ever be held liable for damages under §1983." 460 U.S. at 332; 103 S.Ct. at 1113. The conclusion in Briscoe that witnesses are entitled to absolute immunity indicates that a plaintiff may not destroy a witness' absolute immunity by employing the nicety

of pleading a conspiracy. Nor should a plaintiff be able to destroy a prosecutor's immunity in this fashion.[3]

There is no question that where a prosecutor engages in misconduct while

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[3]It has already been noted that Carter's conspiracy allegations are thin. In both the San Filippo and Malachowski cases, the courts were critical of the plaintiffs conclusory allegations of conspiracy. The Second Circuit dismissed San Filippo's claims for this reason, 737 F.2d at 256, and cautioned that "[w]e think it is imperative for courts to examine with great care any suit charging that prosecution witnesses conspired with the prosecutor, and to dismiss on pre-trial motion those that are clearly baseless. Ibid.

prosecuting an individual, the consequences to that particular criminal defendant can be grave and result in a miscarriage of justice. This was recognized in Imbler, 424 U.S. at 427-428. But weighed against the competing interests of the public in having "the rigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system," id., the Court held that the individual's right to redress had to yield. Id. 429[4] Petitioner does not advance any new arguments to alter this analysis and conclusion.

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[4]Imbler noted that a dishonest prosecutor was subject to disbarment and criminal prosecution, id., no small deterrent to prosecutorial mischief.

Petitioner notes a distinction without a difference, i.e., that the case at bar involves alleged suppression of evidence, while neither Imbler, Burns v. Reid, 500 U.S. 478 (1991), nor Buckley v. Fitzsimmons, 113 S.Ct. 2606 (1993), did. However, the suppression of evidence is the flip side of the decision to present evidence. Whenever a prosecutor makes a decision not to present evidence he or she is subject to the charge of unlawful suppression. To permit a plaintiff to pursue civil litigation against a prosecutor under these circumstances would create such a hole in a prosecutor's immunity, that in effect there would be little left of the immunity at all.[5]

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[5]The decision as to how to use evidence involves the prosecutor's judgment and discretion. Contrary to

Nor do the facts in Burns v. Reed help Petitioner. In Burns the Court upheld the prosecutor's absolute immunity for conduct at a probable cause hearing where the prosecutor kept from the judge, i.e., suppressed, that the confession was obtained while the accused was under hypnosis. No analytical distinction exists between the suppression of the evidence in Burns and that which is alleged here.[6]

Petitioner's position, it can hardly be called ministerial. Petition, p. 21.

[6]The facts in Buckley v. Fitzsimmons are inapposite to the case at bar. Absolute immunity was denied the prosecutor for misconduct during the preliminary investigation of the case and for defamatory remarks during a press

Nor is there a logical distinction between a prosecutor preparing a witness for trial and discussing the witness' testimony beforehand -- or, as Plaintiff would have it, "coaching and instructing the witness what to say...." Petition, 27. In every case, the prosecutor would be vulnerable to the charge that a witness was "coached." The job of every prosecutor, indeed every trial lawyer, entails preparing witnesses for direct and cross examination. The opportunity for incarcerated criminal defendants to become civil plaintiffs in lawsuits against prosecutors alleging that a witness was improperly coached would thoroughly disrupt the criminal justice system.

Petitioner also argues that the

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conference. 113 S.Ct. at 2610.

prosecutor's function is the same as that of a police investigator vis-a-vis the treatment of exculpatory evidence. Petitioner, 21. This misses the point that the prosecutor must weigh the evidence, evaluate the credibility of witnesses, and bears the ultimate responsibility for deciding whether or not to present the evidence to the court. Equating this prosecutorial responsibility with investigative duties is to misunderstand the distinction between the prosecutorial and investigative functions set forth in Buckley v. Fitzsimmons, supra. and myriad other cases.[7]

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[7]Even if Petitioner were correct, the result should perhaps be the extension of absolute immunity to the police officer. See Albright v. Oliver, ___ U.S. ___, 114 S.Ct. 807, 816, n. 5 (J. Ginsburg

II. THE BAR OF PROSECUTORIAL IMMUNITY SHOULD NOT BE ABLE TO BE CIRCUMVENTED BY THE NICETY OF CONCLUSORILY PLEADING A CONSPIRACY

To permit an end run around Imbler by the device of pleading a conspiracy to fabricate or suppress evidence between the prosecutor and a witness would be to effectively eviscerate absolute prosecutorial immunity. The case of Burke v. Miller, 580 F.2d 108 (4th Cir. 1978), cert. denied, 440 U.S. 930, 99 S.Ct. 1268 (1978), decided before Briscoe v. LaHue, supra., is instructive. In Burke, the plaintiff alleged, inter alia, that the prosecutor and State Medical Examiner conspired to present perjured testimony to deprive him of his civil rights by denying him a fair trial on earlier criminal

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concurrence).

charges. Relying on Imbler, the Fourth Circuit affirmed dismissal of the State Medical Examiner as a defendant on the ground of absolute immunity, stating that Imbler

> ... reaffirms "that §1983 [and, we believe §1985 as well] is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them."

Id. at 109. (Footnote omitted; brackets in original.) That the logic of Burke that the absolute immunity enjoyed by prosecutors and witnesses extends to allegations of conspiracy is reflected in Briscoe. Just as a plaintiff is not permitted to destroy a witness' immunity by alleging that the witness and prosecutor conspired to present perjured testimony, Briscoe, 103 S.Ct. at 1113, nor should a prosecutor's immunity be so easily destroyed. As is discussed supra.,

the Malachowski and San Filippo cases do not hold to the contrary and no conflict in the Circuits exists on this point.

CONCLUSION

For the reasons stated, Respondent Burch submits that the petition should be denied.

Respectfully submitted,

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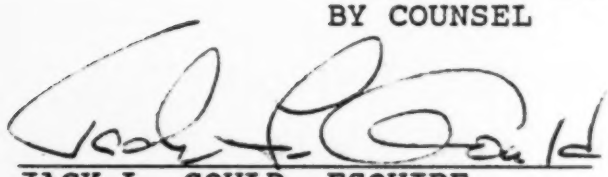
BY COUNSEL



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